IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER, TERM

NO. 76-6767

FRANK R. SCOTT AND BERNIS L. THURMON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent,

REPLY BRIEF OF PETITIONERS TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Government's opposition brief sets forth several arguments against issuing the writ of certiorari which, we believe, do not stand the test of comparison with the record.

ARGUMENTS

I. THE MERITS - MINIMIZATION

The Government contends the court of appeals' analysis of the minimization issue is "entirely consistent with the analysis of the other courts of appeals that have considered the issue." Opposition brief, p.8. That claimed consistency is hard to find. Moreover, it does not take extensive examination of the wiretap records or evidentiary hearing transcripts to demonstrate the point.

Recognizing, as we do, that even total interception can sometimes be reconciled with the minimization requirement, other circuits have articulated as the key to sustaining such wiretaps the efforts of the monitoring agents to avoid unnecessary interception. Judge Winter, for the Fourth Circuit, recently wrote that "the statute is deemed to be satisfied if on the whole the agents have shown a high regard for the right of privacy and have done all they reasonable could to avoid unnecessary intrusion." United States vs. Clerkley, 556 F.2nd 709 (4th Cir. 1977), quoting United States vs. Armocida, 515 F.2nd 29, 42 (3rd Cir.), cert. denied 423 U.S. 858 (1975), quoting, in turn, United States vs. Tortorello, 480 F.2nd 764, 784 (2nd Cir.), cert. denied 414 U.S. 866 (1973). See also United States vs. Quintana, 508 F.2nd 867, 874 (7th Cir. 1975). This case cannot be reconciled with that standard.

The supervising agent testified that, with one irrelevant exception[1], no effort was made to minimize interception. His testimony, excerpted in the petition in Appendix C, was the basis for Judge Waddy's finding, after the first remand, that, despite their admitted knowledge of the minimization requirement, "the monitoring agents made no attempt to comply with the minimization order. . ."

Portions of the court of appeals' opinion reversing the second suppression order pay lip service to the standard quoted above from Clerkley, but its path to decision proceeds on the objective theory that an after the fact analysis showed a substantial number of crime related calls and no apparent category of calls which could be easily identified as unrelated.

Even on a purely objective analysis, this case does not match up to those of other circuits. United States vs. Quintana, 508 F.2nd 867 (7th Cir. 1975), for example, suggests three criteria - the size of the criminal enterprise, the reasonable expectation of the content of the conversations and the extent of judicial supervision. This case fares very badly on the first and third criteria. On the second, Judge Waddy's first opinion (Appendix A) summarizes several categories of calls which could not have related to drugs. A fourth factor, mentioned in Clerkley, is the need to identify unknown participants in the conspiracy. 556 F.2nd at 717. The Government has not claimed any such justification in this case. Even if the court of appeals is correct in suggesting that objective criteria can sometimes validate a bad faith refusal to undertake minimization, its opinion in this case authorizes total incorporation on facts inconsistent with those articulated in other circuits.

1/ The wrong line had been tapped.

II. STANDING

Although conceding that Thurmon, whose non-crime related conversations were overheard, has standing to complain of the minimization violation, the Government argues that Scott does not[2]. In its first opinion, the court of appeals correctly rejected the claim. Judge McGowan's opinion for the court pointed out that 18 U.S.C. §2510(11) defines an "aggrieved person" as any person "who was a party to any intercepted wire. . .communication." Section 2518, in turn, gives any "aggrieved person" the right to "move to suppress the contents of any intercepted wire. . .communication. . .on the grounds that. . .(iii) the interception was not made in conformity with the order of authorization. . ." Scott falls within the statutory definition.

Judge McGowan's reading of the statute is consistent with the case law in the District of Columbia Circuit, see, e.g., United States vs. Bellosi, 163 U.S. App. D.C. 273, 501 F.2nd 833 (1974) and in other circuits. See, e.g., United States vs. Giordano, 469 F.2nd 522 (4th Cir. 1972), affirmed 94 S. Ct. 1820 (1974). Although the non-literal reading of the statute proposed by the Government has been adopted elsewhere, see, e.g., United States vs. King, 474 F.2nd 494 (9th Cir. 1973), cert denied sub nom Light vs. United States, 414 U.S. 846 (1974), that conflict is hardly reason to refuse review here. If the Government is serious about its reading of the statute, it should be urging the Court to consider it as one of the questions presented.

2/ This brief is filed on behalf of Scott and Thurmon. It does not argue for Daviage, who is separately represented.

CONCLUSION

The writ should be granted for all petitioners.

Respectfully Submitted,

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